FILED

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No.

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1996

In Re: JAMES CONSTANT

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

James Constant
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23 pp

QUESTIONS PRESENTED

1. Does the Ninth Circuit appeal court lack jurisdiction to docket appeals directed to the Federal Circuit?

2. Does the Ninth Circuit appeal court have the power to require an appellant to obtain counsel before he can appeal?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all persons against whom relief is sought is as follows: FLETCHER, BRUNETTI and NOONAN, Circuit Judges, Ninth Circuit.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996
MOTION FOR MANDAMUS

Debtor-appellant James Constant respectfully prays that a writ of mandamus issue to vacate the judgements of the Ninth Circuit court of appeals.

OPINIONS BELOW

The opinions of the Ninth Circuit court of appeals appear in APPENDICES A and B and are unpublished.

JURISDICTION

The date on which the Ninth Circuit court of appeals decided my case was 30 September, 1996. No petition for rehearing was permitted. APP. A.

The jurisdiction of this Court is invoked under 28 USC 1651 and Rule 20 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 3(c) and (d); bankruptcy statutes 11 USC 363 (e) and (f) (1) , 11 USC 544 (b) ; jurisdictional statutes 28 USC 158(b) and (d), 28 USC 1291, 28 USC 1294, 28 USC 1295 (a) (1) , 28 USC 1334 (e) , 28 USC 1338(a), patent statute 35 USC 261; and Fifth Amendment are set forth in APPENDIX C.

STATEMENT OF THE CASE

In the bankruptcy court appellants objected to the sale of patents on grounds, first, the bankruptcy court lacks jurisdiction over patents under 28 USC 1334(e) (under patent statute 35 USC 261 debtor is not the owner of patents), second, the bankruptcy court failed to provide adequate protection of non-debtor lienholder's lien under 11 USC 363(e) and, third, applicable nonbankruptcy law 35 USC 261 prohibits the voiding, assignment, and sale of patents under 11 USC 363(f)(1) and 11 USC 544(b). The bankruptcy court dismissed appellant's objections and appellants appealed directing their appeals to the Federal Circuit. Appeals were sent by the bankruptcy clerk to the Ninth Circuit appeal court in violation of FRAP 3(d).

The appeal court denied my motion to transfer appeal to the Federal Circuit and rejected my appeal under a pre-filing order which allows appeal only if I were represented by counsel. APP. A.

REASONS FOR GRANTING THE PETITION

Debtor-appellant James Constant moves the Court to:

1. Vacate the appeal court's order filed 30 September, 1996 as to cases No. 96-56122 and No. 96-56123[1], APP. A, and order the appeal court to transfer appeal to the Federal Circuit on grounds, first, the appeal court lacks jurisdiction to

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1 Case No. 96-56122 appeal by debtor James Constant; Case No. 96-56123 appeal by non-debtor Argerey Constant lienholder and owner of patents at bar.

docket appeals directed to the Federal Circuit, second, the bankruptcy court and bankruptcy appeal panel, from whose orders appeals are taken, lack jurisdiction over patents at bar under 28 USC 1334(e) (patents belong to non-debtor) and, third, the Federal Circuit has exclusive jurisdiction over patent matters.

2. Order the appeal court to actually litigate and expressly decide the jurisdictional questions raised by appellants in the bankruptcy court and Ninth Circuit appeal court. Federal appellate court has special obligation to satisfy itself not only of its own jurisdiction, but also the jurisdiction of lower courts in case under review. Bender v. Williamsport Area School District (US 1986) 89 LED2d___, 106 SCt 1326.

3. Vacate the pre-filing order relied on by the appeal court to reject my appeal in case No. 96-56122, APP. B. , on grounds the Ninth Circuit appeal court lacks power to require me to obtain counsel before I can appeal.

4. order the appeal court to actually litigate and explicitly decide the jurisdictional questions raised by debtor in related adversary cases relied on by the appeal court's pre-filing order. Bender, supra.

I. Federal Rule of Appellate Procedure 3

1. The appeal court's order denying appellant's motion, APP. A, violates appellant's rights, first, "to name the court to which appeal is taken" pursuant to FRAP 3(c) and, second, to have the clerk of the district court comply with its duty to send a copy of the notice "to the clerk of the court of appeals named in the notice" pursuant to FRAP 3 (d). Appellant's notices are named NOTICE OF APPEAL TO THE UNITED

STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, R-418[2]. While the Bankruptcy Appellate Panel clerk clearly failed its duty under FRAP 3(d) to forward appeals to the Federal Circuit, the appeal court lacks jurisdiction to docket appellant's appeals directed to the Federal Circuit. Because the timely filing of a notice of appeal is "mandatory and jurisdictional", United States v. Robinson 361 US 220,224, 80 SCt 282, 4 LEd2d 259 (1960), compliance with the provisions of Rule 3 is of the utmost importance. See General Note to FRAP 3.

2. Any action by the appeal court in the present appeal, other than ordering the clerk of the the appeal court to forward appellant's appeals and papers filed in the appeal court to the Federal Circuit, is a clear usurpation of jurisdictional powers in violation of FRAP 3(d).

3. Rules which judges do not follow serve no purpose.

II. Pre-Filing Order

1. The pre-filing order, APP. B, relied on by the appeal court to reject my appeal, which allows me to appeal only if represented by counsel, is a local practice which defeats my federal rights. If I am competent to represent myself, the appeal court lacks power to force me to accept representation by counsel. Lee v. State of Alabama (CA5 1968) 406 F2d 466 cert. den., 89 S.Ct. 1787, 395 US 927, 23 LED2d 246 reh. den., 90 SCT 44, 396 US 871, 24 LEd2d 129. I have a statutory right under 28 USC 1654 to self-representation and I

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2 Letters and numbers refer to the documents and pages of documents located at the same page number in Debtor's Appendix filed with Debtor's Informal Brief in the appeal court, served 16 September, 1996.

have the right to join in the lienholder's, Mrs Constant's, brief in the appeal court to support my own claims. The appeal court's order cites no authority that gives it power to deprive me of my right to self-representation. A necessary part of the right to self-representation is that a litigant, especially in a civil case, cannot be coerced into accepting counsel rather than proceeding pro-se. Neither the appeal court's authority nor duty extend beyond urging debtor to obtain legal counsel. Andrews v. Bechtel Power Corp. (CAl 1985), 780 F2d 124,137 cert. den., 106 SCt 2896, 476 US 1172, 90 LEd2d 983. Judges cannot insist that a litigant obtain counsel. U.S. v. Warner (CA8 1970) 428 F2d 730 cert. den., 91 SCt 194, 400 US 930, 27 LEd2d 191. The assertion of federal rights is not defeated under the name of local practice. Davis v. Wechsler 263 US 22,24.

2. The pre-filing order is particularly chilling because it is based on the same judgements in related adversary cases relied on by the trustee to defeat my appeal, judgements which I claim are invalid for lack of jurisdiction of the subject matter and for which I seek declaratory relief against judges of the appeal court for making these judgements in the clear lack of all jurisdiction. Collateral attack is permitted because the jurisdictional questions raised by me in those earlier cases were not actually litigated and expressly decided. Fed. Practice and Procedure, Wright, Miller, Cooper Section 3536 footnote 5 (numerous citations); footnote 12 (citing the Restatement of Judgements 12); footnotes 15 and 16. The earlier judgements in related adversary cases relied on by the trustee and relied on by the appeal court's pre-filing order

would work manifest injustice on appellants, by depriving appellants of an appeals procedure to substantively and evidentially attack the earlier decisions before the same courts that rendered them. Spindelfabrik et als v. Schubert et als (CAFC 1988) 9 USPQ2d 1743.

CONCLUSION

My Petition for writ of mandamus should be granted.

Dated: 27 October, 1996

Respectfully submitted

James Constant
1603 Danbury Dr.
Claremont, CA 91711
(909) 6624-1801

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
SEP 30, 1996

In re: JAMES CONSTANT, Debtor.	Nos.	96-56122 96-56123
JAMES CONSTANT, ARGERY CONSTANT, Apellants, vs. DAVID L. RAY, Appellee.	BAP#	CC-95-1848-BvH
		ORDER

Before: FLETCHER, BRUNETTI and NOONAN, Circuit Judges

Appellants, motion to transfer these appeals to the Federal Circuit is denied. Appeal no. 96-56122, filed by James Constant, was opened in error, as James Constant is subject to a pre-filing review order in this court. Upon review of the notice of appeal and accompanying documents in that appeal pursuant to the pre-filing review order entered in docket no. 94-80318, this court hereby rejects the appeal for lack of merit and directs the Clerk to close appeal no. 96-56122 as opened in error and to lodge without filing the appeal and this order in docket no. 94-80318. No motions for reconsideration, modification, clarification or rehearing of this order shall be filed or entertained.

A review of the record in appeal no. 96-56123 demonstrates that the appeal may be appropriate for summary dis-

position because the questions on which the decision in the appeal depends may be so insubstantial as not to justify further proceedings. See 9th Cir. R. 3-6.

Within 21 days from entry of this order, appellant Argery Constant shall show cause why the judgment in this appeal should not be summarily affirmed. Appellee may file a reply to appellant's response within ten days from service of the response. Appellant's failure to comply with this order shall result in the automatic dismissal of this appeal by the Clerk for failure to prosecute. 9th Cir. R. 42-1. Briefing is suspended during the pendency of this order to show cause.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT 20, 1996

In re: JAMES CONSTANT,) No. 94-80318
Respondent) ORDER

Before: BROWNING, FARRIS AND LEAVY,
Circuit Judges

On September 28, 1994, this court issued an order directing respondent James Constant to respond and show cause why this court should not enter the following pre-filing review order. This court has reviewed and considered the response to the order to show cause, and hereby enters the following pre-filing review order.

Respondent's failure to comply with the order shall result in any new appeal(s) he seeks to file being dismissed or not being filed and other sanctions being levied against respondent, such as a monetary judgment or a judgment of contempt, as the court may deem appropriate. The Clerk shall accept no further filings in this closed docket.

Pre-Filing Review Order

(1) This pre-filing review order shall apply to all notices of appeal and petitions for extraordinary writs filed by respondent, in whole or in part, if he proceeds pro se. This order shall not apply to appeals or petitions in which respondent has counsel or where the district court has expressly certified in its order that the appeal or petition is not frivolous. Should respondent fail to comply with any of the provisions

of this prefiling review order, the Clerk shall not file the document and shall return the document to respondent, informing him of the deficiencies and granting him 14 days to correct the deficiency.

(2) Each notice of appeal or petition filed by respondent shall comply with the requirements of the Ninth Circuit Rules and the Federal Rules of Civil and Appellate Procedure, especially Federal Rule of Civil Procedure 54(b) and Federal Rule of Appellate Procedure 4(a), and shall contain the following sentence in capital letters "THIS NOTICE OF APPEAL/PETITION IS FILED SUBJECT TO PRE-FILING REVIEW ORDER No. 94-8031811" in the body of the notice of appeal or petition.

(3) Each of respondent's future notices of appeal and petitions shall include a copy of the order(s) of the district court from which he is appealing, a short and plain statement of the facts or law on which he will rely for the purposes of the appeal, and a statement thatxnot previously appealed this order or raised this issue in a prior appeal or petition.

(4) If respondent's future notices of appeal and petitions are submitted in compliance with this order, the Clerk shall lodge the notice of appeal or petition and accompanying documents. The Clerk shall not file the appeal or petition or establish a presumptive schedule for the certificate of record, briefing, or transcripts except upon further order of the court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FEDERAL RULE OF APPELLATE PROCEDURE 3

(c) ... A notice of appeal ... must name the court to which the appeal is taken. ...

(d) ... The clerk of the district court shall forthwith send a copy of the notice and of the docket entries to the clerk of the court of appeals named in the notice. ...

11 USC 363(e) ADEQUATE PROTECTION OF INTERESTS IN PROPERTY

Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

11 USC 363(f)(1) SALES SUBJECT TO APPLICABLE NONBANKRUPTCY LAW

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

11 USC 544(b) VOIDANCE OF TRANSFERS SUBJECT TO APPLICABLE NONBANKRUPTCY LAW

The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor

that- is voidable under **applicable law** by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502 of this title.

28 USC 158 APPEALS TO BANKRUPTCY APPELLATE PANELS

(b) The judicial council of a circuit shall establish a bankruptcy appellate panel.....

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgements, orders, and decrees entered under subsections (a) and (b) of this section.

28 USC 1291 JURISDICTION OF APPEALS COURTS

The courts of appeals (other than the Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States .... The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 USC 1294 CIRCUITS IN WHICH DECISIONS ARE REVIEWABLE

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals ...

28 USC 1295 JURISDICTION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction - (1) of an appeal

from a final decision of a district court of the United States, if the jurisdiction of that court was based, in whole or part, on section 1338 of this title ...

28 USC 1334 JURISDICTION OVER PROPERTY IN BANKRUPTCY CASES AND PROCEEDINGS

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 USC 1338 JURISDICTION OF PATENT SUITS

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents ...

35 USC 261 OWNERSHIP AND ASSIGNMENT INTERESTS IN PATENTS

.....patents, or any interest therein, shall be assignable in law'by an instrument in writing. The ... patentee, or his assigns or legal representatives may in like manner may in like manner grant and convey an exclusive right under his ... patents, ... An assignment ... shall be void against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from the date or prior to the date of such subsequent purchase or mortgage.

AMENDMENT V UNITED STATES CONSTITUTION

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken ior public use without just compensation.

No. _____

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1996

In Re: JAMES CONSTANT

PROOF OF SERVICE

I, James Constant, declare that on this date, 27 October, 1996, as required by Supreme Court Rule 29 I have served the enclosed PETITION FOR WRIT OF MANDAMUS on each party to the above proceeding and on every other person required to be served, by depositing an envelope containing the above document in the United States mail properly addressed to each of them and with first class postage pre-paid.

The names and addresses of those served are:

Fletcher, Circuit Judge
United States Court of Appeals for the Ninth Circuit
121 Spear Street, PO Box 192939
San Fransisco, California 94119-3939

Brunette, Circuit Judge
United States Court of Appeals for the Ninth Circuit
121 Spear Street, PO Box 192939
San Fransisco, California 94119-3939

Noonan, Circuit Judge
United States Court of Appeals for the Ninth Circuit
121 Spear Street, PO Box 192939
San Fransisco, California 94119-3939

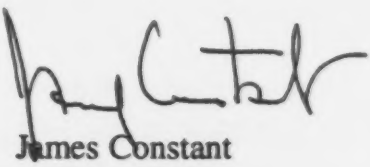
Gordon Stone III
SALTZBURG, RAY & BERGMAN
10960 Wilshire Boulevard, 10th Floor
Los Angeles, California 90024-3702

Office of the United States Trustee
300 North Los Angeles Street, Room 3101
Los Angeles, California 90012

Argerey Constant
1603 Danbury Dr
Claremont, CA 91711

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 27 October, 1996



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